IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

ARCHIE MAXEY — PLAINTIFF

vs. — Civil Action No. 3:95cv6-D-A

GENERAL MOTORS CORPORATION — DEFENDANT

MEMORANDUM OPINION

By opinion and order dated November 15, 1996, the undersigned overruled the objections of the defendant to a discovery order entered by United States Magistrate Judge S. Allan Alexander on September 19, 1996. Maxey v. General Motors Corp., 1996 WL 692222, *1 (N.D. Miss. Nov. 15, 1996), Civil Action No. 3:95cv006-D-A (Davidson, J.) (Memorandum Opinion and Order). The defendant General Motors Corporation ("GM") has now moved the court to reconsider its decision expressed in that opinion and order, or in the alternative, to grant the certification of an appeal of that interlocutory order pursuant to 28 U.S.C. § 1292(b).

I. Reconsideration of this court's opinion and order

GM basically argues to the court that it should reconsider its decision of November 15 on two grounds. First, the defendant charges that it did in fact timely present the crux of its objections to the disclosure of the documents in question. GM again states to the court that "GM served its responses to the Ninth Request for Production of Documents on August 9, 1996, two weeks prior to the expiration of the 30 day time period for responding to the requests." GM's Brief, p.3. GM does not, however, dispute that its filing of a Motion for a Protective Order covering these documents did not occur until *after* the expiration of the established deadline. In any event, this court found GM's August 9 response insufficient to preserve its objections. Maxey v. General Motors Corp., 1996 WL 692222, *1 (N.D. Miss. Nov. 15, 1996), Civil Action No. 3:95cv006-D-A (Davidson, J.) (Memorandum Opinion and Order, p. 6-7). Otherwise on the timeliness issue, GM raises nothing new before the court. GM's Brief, p.3 ("GM will not reiterate its position on the timeliness of its assertions of privilege and work product . . . "). This

argument offers GM no justification for reconsideration.

Secondly, GM argues that the court erred in failing to consider the actual claims of privilege in making its determination of whether GM waived those privileges or failed to properly present them to the court. Along this same line of reasoning, GM argues that the importance of the asserted privileges lends weight against any finding of a waiver of those privileges. This court agrees that established privileges which protect against legal discovery mechanisms are most important and essential to a just system of jurisprudence. Their importance is reflected in the mere fact that they exist at all. Nevertheless, privileges such as the attorney-client privilege and the work-product doctrine are *not* absolute. See, e.g., United States v. Armstrong, --- U.S. ---, 116 S.Ct. 1480, 1490, 134 L.Ed.2d 687 (1996) (Breyer, J., Concurring) ("After all, '[t]he privilege derived from the work-product doctrine is not absolute.'") (citing United States v. Nobles, 422 U.S. 225, 239, 95 S.Ct. 2160, 2170, 45 L.Ed.2d 141 (1975)); Cairns v. Oatman Mining & Exploration, Inc., 1988 WL 24136, *1 (E.D. La. Mar. 8, 1988) ("The attorney-client privilege is not absolute and the proponent of the privilege bears the burden of demonstrating its applicability.") (citing Garner v. Wolfinbarger, 430 F.2d 1093, 1100-01 (5th Cir.1970), cert. denied, 401 U.S. 974, 91 S.Ct. 1191, 28 L.Ed.2d 323 (1971); Jonathan Corp. v. Prime Computer, Inc., 114 F.R.D. 693, 695 (E.D. Va.1987)). As to the asserted "self-critical analysis" privilege, this court is not certain that such a privilege even exists in this circuit. Louisiana Environmental Action Network v. Evans Industries, 1996 WL 325588, *2 (E.D. La. Jun. 11, 1996) ("This Court is unable to find a Fifth Circuit case addressing whether there actually exists a so-called privilege of self-critical analysis . . ."). If it does, even it is not absolute and it may be waived. See, e.g, Zapata v. IBP, Inc., 1994 WL 649322, *4 (D. Kan. Nov. 10, 1994); University of Kentucky v. Courier-Journal & Louisville Times Co., 830 S.W.2d 373, 378 (Ken. 1992); Cabinet For Human Resources v. McDonald, 765 S.W.2d 581, 582 (Ken. Ct. App. 1988). GM may not simply fail to comply with the Federal Rules of Civil Procedure and the Local Rules of this court and then expect to avoid the consequences of such failure on the

ground that the attorney-client privilege, or any other privilege, is revered in our system of jurisprudence. Otherwise, the applicable rules governing discovery would have no import as to matters supposedly protected by privilege and parties could ignore the rules with impunity.

It is also important to this court's November 15 decision that review of the Magistrate Judge's decision by this court is limited. This court's review of that order was not *de novo*, but was limited to a determination of whether the order was "clearly erroneous or contrary to law." That this court might have reached a different decision if initially faced with the questions presented is irrelevant. This court remains unconvinced that its prior decision of November 15 is in error, and the court shall not disturb it.

II. Certification of appeal of an interlocutory order

Alternatively, GM requests that this court certify issues of this court's November 15 order for appeal to the Fifth Circuit Court of Appeals. 28 U.S.C. § 1292(b). As the plaintiff points out in his response, GM does not specifically state what the issues are upon which it seeks certification. In light of this court's November 15 order, the undersigned can only presume that GM seeks this court to certify the issue of whether or not the Magistrate Judge's findings that:

) GM failed to timely assert its claims of privilege; and

2) GM's untimely claim of privilege justified waiver of those privileges

were clearly erroneous or contrary to law. As both sides to this litigation recognize, in order for GM to be entitled to § 1292(b) certification from this court, it must show that:

) this court's order involves a controlling question of law as to which there is a substantial ground for difference of opinion[1]; and
) an immediate appeal from the order in question may materially advance the ultimate termination of this litigation.

28 U.S.C. § 1292(b). As discovery matters, issues such as the ones at bar are generally less likely

[1] GM is apparently not accustomed to discovery practice in the Northern District of Mississippi since the enactment of this court's Uniform Plan. GM's Brief, p.5 ("GM has been unable to find any other courts that have embraced this Court's interpretation of a party's obligations under initial or core disclosures."). GM has had difficulty with this court's discovery orders throughout this case. E.g., Maxey, Civil Action No. 3:95cv006-D-A (N.D. Miss. Apr. 16, 1996) (Order imposing sanctions against GM); (N.D. Miss. Jul. 18, 1996) (Order imposing sanctions against GM); (N.D. Miss. Nov. 11, 1996) (Order imposing sanctions against GM).

to be entitled to certification:

> It is indeed that rare case where the issue presented in the context of discovery and a foreordained trial of unusual length involves a controlling question of law and where an immediate appeal may materially advance the ultimate termination of the litigation.

Hyde Const. Co. v. Koehring Co., 445 F.2d 337, 341 (5th Cir. 1972). Further, as the movant, GM carries the burden of establishing to this court that the appropriate requisites are met in this case and that appeal of this court's interlocutory order of November 15, 1996. It has not carried its burden in this case, and the request for certification of that order shall be denied.

As already noted, in order for the undersigned to grant GM's motion, one factor that GM must demonstrate to this court's satisfaction is that "an immediate appeal may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). While GM has spent much time arguing to this court about the importance of the attorney-client privilege and the fact that this court has not yet addressed the merits of their claims of privilege, it has not presented anything that would indicate that the allegedly protected documents are of such vital importance to this litigation that the appeal of this court's resolution of their disclosure (or nondisclosure) would facilitate the end of this litigation, much less "materially advance" such an end. Instead, GM merely states:

> An appellate decision on these issues would clearly impact the amount and type of evidence presented in this case. Clearly then, allowing the Court of Appeals to review these issues would materially advance the ultimate termination of the litigation.

GM's Brief, p. 6. This court agrees that a decision by the Fifth Circuit has the potential to "impact the amount and type of evidence presented in this case." It does not logically follow, however, that any impact would necessarily be substantial or "may materially advance the ultimate termination" of this litigation. Evidence relevant to this point would include not only the documents in question, but also the amount and nature of other evidence in this case. Knowledge of the other evidence that is available for presentation in this case is important so that the court can place the questioned documents in their proper context of the entire scope of evidence in this case. That the disclosure of these documents might merely make the plaintiff

more or less likely to prevail is not the question, but rather the inquiry focuses upon whether an appellate decision's potential impact is so great as to *materially* affect the ultimate outcome of the litigation. Beyond its conclusory statements, the defendant has offered nothing to the court that would lend itself to such a finding. While the court is in possession of a copy of the allegedly protected documents themselves, it is impossible for this court to determine the relative evidentiary weight of these documents without having other evidence with which to compare it. Indeed, in the absence of any evidence that these documents would have such a strong impact upon the weight of the plaintiff's case, this court is of the opinion that an appeal to the Fifth Circuit on this matter would serve to protract this litigation instead of expedite its resolution.

GM also essentially argues that this court should permit an interlocutory appeal in light of the lack of an available remedy if in fact this court's November 15 order is incorrect.[2] "When a district court orders production of information over a litigant's claim of a privilege not to disclose, appeal after a final judgment is an inadequate remedy." Westinghouse Elec. Corp. v. Republic of the Phillipines, 951 F.2d 1414, 1422 (3rd Cir. 1991) (quoting Bogosian v. Gulf Oil Corp., 738 F.2d 587, 591 (3rd Cir. 1984)); see also In Re Burlington Northern, Inc., 822 F.2d 518, 522-23 (5th Cir. 1987). Both the Westinghouse and Burlington Northern decisions related to the availability of a entirely separate type of remedy - a writ of mandamus - and did not pertain to the application of 28 U.S.C. § 1292(b). Indeed, that GM may petition for a writ of mandamus means that they do in fact have another available avenue for relief. See GM's Brief, p. 7 ("If this Court denies GM's Motion for Reconsideration and GM's Motion for Certification Pursuant to 28 U.S.C. § 1292(b), GM will seek a writ of mandamus."). In any event, the propriety of a writ of mandamus is a separate question from the propriety of relief under 28 U.S.C. § 1292(b).

III. Conclusion

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[2] GM will not be able to appeal today's order of the court. In re Air Crash Disaster, 821 F.2d 1147, 1167 (5th Cir. 1987) ("The decision to certify an interlocutory appeal pursuant to section 1292(b) is within the discretion of the trial court and unappealable.") (citing In re McClelland Engineers, Inc., 742 F.2d 837, 839 (5th Cir. 1984), cert. denied, 469 U.S. 1228, 105 S.Ct. 1228, 84 L.Ed.2d 366 (1985)).

After careful consideration, the undersigned is of the opinion that this court's prior decision of November 15, 1996 is correct and shall not disturb it. Further, the court is not convinced that an interlocutory appeal of this court's November 15 order to the Fifth Circuit Court of Appeals "may materially advance the ultimate termination of the litigation" in this cause. GM has failed to carry its burden in these matters. As such, GM's motions shall be denied.

A separate order in accordance with this opinion shall issue this day.

This the ____ day of December 1996.

United States District Judge

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FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

ARCHIE MAXEY — PLAINTIFF

vs. — Civil Action No. 3:95cv006-D-A

GENERAL MOTORS CORPORATION — DEFENDANT

ORDER DENYING MOTION TO RECONSIDER, OR
IN THE ALTERNATIVE, FOR CERTIFICATION
PURSUANT TO 28 U.S.C. § 1292(b)

Pursuant to a memorandum opinion issued this day, it is hereby ORDERED THAT:

1) the motion of the defendant General Motors Corporation for this court to reconsider its order of November 15, 1996, is hereby DENIED;

2) the motion of the defendant pursuant to 28 U.S.C. § 1292(b) for the certification of the appealability of an interlocutory order of this court dated November 15, 1996, is hereby DENIED;

3) the motion of the defendant for a stay of this court's order dated November 15, 1996, is hereby DENIED.

SO ORDERED, this the _____ day of December 1996.

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United States District Judge